THE NEXT "GREAT DISSENTER"? HOW CLARENCE THOMAS IS USING THE WORDS AND PRINCIPLES OF JOHN MARSHALL HARLAN TO CRAFT A NEW ERA OF CIVIL RIGHTS

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ABSTRACT

Associate Justice Clarence Thomas is hardly known as a warrior for either the civil rights movement or the African-American community. The most conservative Justice on the U.S. Supreme Court, Thomas has consistently voted against what many perceive to be the interests of African Americans, and he has proudly led the charge to dismantle the crowning jewels of the civil rights movement, particularly affirmative action. But Thomas, this Note argues, nonetheless views himself as both a civil rights leader and an advocate for the African-American community. He believes that affirmative action and similar initiatives have obstructed the path to true racial equality, and he has fully committed himself to clearing the way. To bolster and legitimize his opposition to affirmative action, Thomas has relied on the words and principles of John Marshall Harlan, the Supreme Court's first civil rights advocate. Although Harlan's contemporaries failed to appreciate the wisdom behind his lonesome dissents, Harlan has since been hailed as a "great dissenter" and a prophetic champion of civil rights. This Note argues that Thomas, intrigued by Harlan's vindication, has appropriated Harlan's words and principles in an attempt to secure a similar legacy for himself.

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INTRODUCTION

When one thinks about the civil rights[1] heroes of the twentieth and twenty-first centuries, Clarence Thomas,[2] the most conservative U.S. Supreme Court Justice of his time,[3] is unlikely to come to mind. Indeed, during the course of his legal career, Thomas has made few friends in the African-American community.[4] He has complained that all civil rights leaders ever do is "bitch, bitch, bitch, moan and moan, whine and whine."[5] He has vigorously opposed affirmative action, which he condemns as paternalistic, patronizing, and counterproductive.[6] Moreover, he has openly scorned the reasoning of *Brown v. Board of Education*,[7] calling the landmark decision and all of its progeny a "missed opportunity."[8] When Thomas was

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1. Technically, the term "civil rights" refers to "[t]he individual rights of personal liberty guaranteed by the Bill of Rights and by the 13th, 14th, 15th, and 19th Amendments, as well as by legislation such as the Voting Rights Act." BLACK'S LAW DICTIONARY 263 (8th ed. 2004). This Note examines "civil rights" in the racial context only. This usage is consistent with the meaning of "civil rights" in the context of the "civil rights movement," the organized struggle for racial equality that began in the 1950s with *Brown v. Board of Education*, 347 U.S. 483 (1954), and continued through the death of Martin Luther King, Jr., in 1968. *See generally* RAYMOND D'ANGELO, THE AMERICAN CIVIL RIGHTS MOVEMENT (2001) (describing how two hundred years of racism toward African Americans finally gave way to a formal civil rights movement in the 1950s).

2. Thomas was nominated to the United States Supreme Court in 1991 by President George H. W. Bush. The Justices of the Supreme Court, http://www.supremecourtus.gov/about/biographiescurrent.pdf (last visited Sept. 14, 2008). For a general description of Thomas's life and legal career, see CLARENCE THOMAS, MY GRANDFATHER'S SON (2007); KEVIN MERIDA & MICHAEL A. FLETCHER, SUPREME DISCOMFORT (2007).

3. *See* MERIDA & FLETCHER, *supra* note 2, at 249 ("[Thomas] emerge[d] as what many legal scholars call the most conservative justice on the court, the one most consistent in hewing to a strict, unchanging reading of the Constitution."); JEFFREY TOOBIN, THE NINE 99–113 (2007) ("[Thomas] was by far the most conservative member of the Rehnquist Court, probably the most conservative justice since the Four Horsemen, FDR's nemeses, retired during the New Deal."); *see also* JEFFREY ROSEN, THE SUPREME COURT 1–5 (2006) (discussing Thomas's zealous devotion to his conservative principles).

4. *See* MERIDA & FLETCHER, *supra* note 2, at 3–4 ("[T]he antipathy toward Thomas among African Americans is wide and deep and persistent.").

5. THOMAS, *supra* note 2, at 183.

6. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240–41 (1995) (Thomas, J., concurring in part and concurring in the judgment) ("[T]here can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. So-called 'benign' discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence.").

7. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

8. Clarence Thomas, *Toward a "Plain Reading" of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 HOW. L.J. 983, 991–92 (1987); *see also* SCOTT

nominated to the Court in 1991, the National Association for the Advancement of Colored People (NAACP), "the nation's oldest and largest civil rights organization," opposed his confirmation.[9]

Despite this opposition, Thomas, only the second African American to serve on the United States' highest Court, would like nothing more than to be remembered as a civil rights hero of his time.[10] Thomas sees himself as a courageous soldier of racial equality,[11] selflessly fighting for the natural rights avowed by the founders of the United States, the abolitionists of the Civil War era, and the civil rights giants of the twentieth century.[12] As such, Thomas believes that he is fighting for a world in which all classifications on the basis of race are unconstitutional—a world that he believes the Declaration of Independence promises[13] and the Fourteenth Amendment compels.[14]

DOUGLAS GERBER, FIRST PRINCIPLES 48–51 (1999) ("In many of his speeches and writings, Thomas has been critical of the modern Supreme Court's civil rights jurisprudence. He starts at the beginning, with *Brown* . . . .").

9. MERIDA & FLETCHER, *supra* note 2, at 176.

10. *See infra* Part IV.A.

11. *See* MERIDA & FLETCHER, *supra* note 2, at 23 ("The courageous underdog is one of [Thomas's] favorite personas, adopted by him in countless speeches and observed by friends in private conversations. Putting on his battle armor—seeing himself as a man under attack for his ideas—is one of the ways Thomas copes with the ostracism he endures from blacks who disagree with him.").

12. *See* GERBER, *supra* note 8, at 41 ("Thomas himself pointed out . . . that political giants such as Martin Luther King, Jr., Abraham Lincoln, and the Founders of our nation believed that the Constitution should be interpreted in light of natural law."); Thomas, *supra* note 8, at 986 ("[T]o accept Lincoln's interpretation of the American Founding is not merely to go with the winner, or indulge in a sentimental reminiscence about the Great Emancipator . . . . [It would also] preserve what is strongest in the original Civil Rights movement: its insistence that what it demanded is what America had always promised . . . .").

13. *See infra* notes 82–87 and accompanying text; *see also* THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) ("We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by the Creator with certain unalienable Rights . . . .").

14. *See infra* notes 82–87 and accompanying text. The Fourteenth Amendment says that "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend XIV, § 1. Congress proposed the Fourteenth Amendment in 1866 and the states ratified thereafter. *See* ANDREW KULL, THE COLOR-BLIND CONSTITUTION 82–87 (1992) (describing the proposal and ratification of the Fourteenth Amendment). It was added to the Constitution following the Civil War along with the Thirteenth Amendment and the Fifteenth Amendment. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 207 (2d ed. 2005). Scholars sometimes refer to these three amendments as the "Reconstruction amendments." *See, e.g.*, Tomiko Brown-Nagin, *Toward a Pragmatic Understanding of Status-Consciousness: The Case of Deregulated Education*, 50 DUKE L.J. 753, 838 n.423 (2000) ("*Brown* reaffirmed the role for the federal government implied in the *Reconstruction amendments* by nationalizing civil rights." (emphasis added)).

To achieve this racial equality, Thomas believes that the United States must first tread backward nearly fifty-five years to the Court's landmark decision in *Brown*, where Thomas believes that the fight for racial equality went tragically astray.[15] The "great flaw" of *Brown*, according to Thomas, is that the Court did not rely on the lonely dissent of John Marshall Harlan[16] in *Plessy v. Ferguson*,[17] which affirmed the importance of the "Founders' constitutional principles,"[18] and rightly declared the Constitution "color-blind."[19] As a result, Thomas argues, the Court did not establish a *per se* rule that all classifications on the basis of race are unconstitutional, leaving Harlan's colorblind Constitution, and the founders' constitutional principles, unsatisfied.[20] Moreover, Thomas contends, this failure opened the door for affirmative action and other initiatives designed to help African Americans adapt to life after segregation—initiatives that Thomas believes disempowered African Americans and obscured the dream of a colorblind Constitution.[21]

In an effort to remedy *Brown*'s "great flaw," Thomas has borrowed the words and principles of John Marshall Harlan,

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15. *See* Thomas, *supra* note 8, at 991–92 ("*Brown* was a missed opportunity, as [was] all its progeny . . . . The task of those involved in securing the freedom of all Americans is to turn policy toward reason rather than sentiment, toward justice rather than sensitivity, toward freedom rather than dependence—in other words, toward the spirit of the Founding. These steps would validate the *Brown* decision, by replacing the Warren opinion with one resting on reason and moral and political principles, as established in the Constitution and the Declaration of Independence, rather than on feelings.").

16. John Marshall Harlan was appointed to the Court in 1877 by President Rutherford B. Hayes, LINDA PRZYBYSZEWSKI, THE REPUBLIC ACCORDING TO JOHN MARSHALL HARLAN 41 (1999), and served until his death in 1911, *id.* at 188. Harlan's grandson, John Marshall Harlan II (Harlan II), served on the Court from 1955 until 1971 and was a consistent dissenter on the Warren Court. *See generally* TINSLEY E. YARBOROUGH, JOHN MARSHALL HARLAN (1992) (describing the life and jurisprudence of Harlan II, the "great dissenter" of the Warren Court).

17. Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

18. Thomas, *supra* note 8, at 990.

19. *Plessy*, 163 U.S. at 559 ("Our constitution is color-blind, and neither knows nor tolerates classes among citizens.").

20. *See* Thomas, *supra* note 8, at 991 ("The *Brown* psychology makes the legal and social environment all-controlling: 'the feeling of inferiority' or 'the sense of inferiority' is the problem. . . . Thus, the *Brown* focus on environment overlooks the real problem with segregation, its origin in slavery, which was at fundamental odds with the founding principles.").

21. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 241 (1995) (Thomas, J., concurring in part and concurring in the judgment) ("So-called 'benign' discrimination . . . stamp[s] minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences.").

Thomas's own judicial hero[22] and the Court's only civil rights champion at the turn of the twentieth century.[23] Although Harlan's contemporaries largely dismissed Harlan as a "moralizing eccentric" during his time on the Court,[24] *Brown* and its progeny dramatically vindicated his civil rights dissents, and commentators since *Brown* have celebrated him as a great prophet of racial equality.[25]

This Note argues that Thomas, during his tenure on the Court, has used Harlan's words and principles to manipulate the meaning of *Brown* to reflect his own equal protection philosophy. Armed with Harlan's colorblind Constitution, Thomas has fought vigorously for the racial equality that he believes the founders promised in the Declaration of Independence. Although his cause is unpopular with his contemporaries, Thomas is confident that one day history will vindicate his views, and he, like Harlan, will be hailed as a prophetic leader of civil rights.[26]

Part I of this Note describes how Thomas's life experiences, particularly his experiences as a racial minority, have greatly influenced his judicial philosophy. Part II illustrates how Thomas has used the natural law principles of Harlan and other nineteenth-century scholars to hone his equal protection philosophy. Part III argues that Thomas has appropriated Harlan's colorblind Constitution to redefine the meaning of *Brown* to reflect his equal protection philosophy. Part IV demonstrates that despite the condemnation he has received from the African-American community, Thomas believes that he is a prophetic champion of civil rights, and suggests that Thomas has sacrificed his contemporary significance on the Court so that he, like Harlan, can have his lonely civil rights opinions vindicated by history.

I. AN UNLIKELY ADVOCATE

In his memoirs, Thomas recalls a courtesy visit he received upon his confirmation to the Court from his predecessor, Thurgood

22. MERIDA & FLETCHER, *supra* note 2, at 249–50.

23. PRZYBYSZEWSKI, *supra* note 16, at 8.

24. *See* ROSEN, *supra* note 3, at 77 (describing how commentators regarded Harlan as a moralizing eccentric for much of American history).

25. *E.g.*, *id.* at 80.

26. *See infra* notes 216–26 and accompanying text.

Marshall,[27] a "civil rights icon"[28] and the mastermind behind *Brown*.[29] The visit "ballooned into a two-and-a-half-hour" discussion, during which Thomas told Marshall, "I would have been shoulder to shoulder with you back then—if I'd had the courage."[30] Marshall, nicknamed "Mr. Civil Rights" for his legal advocacy on behalf of African Americans,[31] apparently responded, "I did in my time what I had to do. . . . You have to do in your time what you have to do."[32]

Because Thomas was assuming Marshall's seat on the Court, this encounter represented a passing of the gavel between Marshall and his successor. But by Thomas's account of the visit, strategically placed at the end of his autobiography,[33] Marshall was passing to Thomas more than his place on the Court—Marshall was passing his position as a civil rights advocate. Marshall's words have stayed with Thomas throughout his tenure on the Court.[34] Thomas's version of civil rights advocacy, however, was probably not what Marshall, the revered architect of *Brown*, had in mind.

To many African Americans, Thomas's ideology appears cold, radical, and severe.[35] Thomas denounces affirmative action as patronizing and paternalistic, arguing that special treatment on account of race can only promote dependency and a sense of entitlement within minority groups.[36] For similar reasons, Thomas has forcefully condemned public benefit programs designed to assist individuals living below the poverty line,[37] and he has shown no

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27. *See* ROSEN, *supra* note 3, at 3 ("Thomas, a southern black conservative, was George H. W. Bush's choice to replace the civil rights icon Thurgood Marshall in 1991.").

28. *Id.*; *see also* U. W. Clemon & Bryan K. Fair, *Lawyers, Civil Disobedience, and Equality in the Twenty-First Century*, 54 ALA. L. REV. 959, 960 (2003) ("[Marshall] sacrificed his life to liberate all Americans from the stains of state-sponsored discrimination.").

29. For information on Marshall's role in *Brown*, see JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 209–25 (1998).

30. THOMAS, *supra* note 2, at 286.

31. MERIDA & FLETCHER, *supra* note 2, at 9.

32. THOMAS, *supra* note 2, at 286.

33. *Id.*

34. *Id.*

35. *See, e.g.*, *infra* text accompanying note 39.

36. *E.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240–41 (1995) (Thomas, J., concurring in part and concurring in the judgment).

37. *See* Juan Williams, *Black Conservatives, Center Stage*, WASH. POST, Dec. 16, 1980, at A21 ("Thomas is also a man who has a sister on welfare back in his home state of Georgia, but he feels that he must be opposed to welfare because of the dependency it can breed in a person. 'She [his sister] gets mad when the mailman is late with her welfare check,' he says. 'That is how

sympathy for those who turn to crime to make ends meet.[38] As one NAACP leader bemoaned, Thomas "sides in almost every instance with the powerful over those without power," voting "directly against the interest of blacks."[39]

Ironically, however, Thomas has largely built his judicial philosophy around what he perceives to be the interests of African Americans; he has simply defined those interests differently. To achieve a world in which the color of one's skin is "truly the least important thing about a person,"[40] Thomas argues, "the Constitution and the nation it form[ed] [must] be interpreted to its highest, not simply as an efficient functioning instrument that parcels out foods to different competing interest groups."[41] True racial equality, Thomas believes, requires strict limits on government power.[42] Though some Americans may suffer as a result of a limited government, Thomas admits, freedom must come at that price.[43]

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dependent she is. What's worse is that now her kids feel entitled to the check too. They have no motivation for doing better or getting out of that situation.'" (alteration in original)).

38. *See* Graham v. Collins, 506 U.S. 461, 478 (1993) (Thomas, J., concurring) ("The power to be lenient is [also] the power to discriminate." (quoting McCleskey v. Kemp, 481 U.S. 279 (1993) (internal quotations omitted))); MERIDA & FLETCHER, *supra* note 2, at 90–91 ("Once our legal system accepted the general premise that social conditions and upbringing could be excuses for harmful conduct, the range of causes that might prevent society from holding anyone accountable for his actions became potentially limitless." (quoting ClarenceThomas)).

39. MERIDA & FLETCHER, *supra* note 2, at 248 (quoting Wade Henderson, former director of the Washington bureau of the NAACP).

40. Clarence Thomas, *Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!*, 5 YALE L. & POL'Y REV. 402, 403 n.3 (1987).

41. Thomas, *supra* note 8, at 989.

42. *See id.* (discussing the importance of "good institutions that protect and reinforce good intentions").

43. For example, in a lecture at Ohio Northern University Pettit College of Law in 1994, Thomas explained:

> I do hear quite a bit about freedom and rights but little about th[e] awful responsibilities and consequences [that come with them]. . . .
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> . . . We often tell our children that they cannot go to a party or the movies until some task or chore has been done. And, yet, when we talk about rights and freedom in the broader context of society, at no time do we seem comfortable mentioning that some preconditions must be met. But, we all somehow know that freedom and responsibilities are equally yoked and that only in tandem can they cultivate the vast fields of opportunity and only in tandem can we expect to have an orderly society or ordered liberty. And, we all know that though we are all free to sow in the spring, only those who do so will reap. But, we are far more comfortable bemoaning the poor harvest of those who have failed to sow than we are at pointing out that one cannot have one without the other. Nor can we have the society that we cherish if we lose our will to demand that each individual discharge his responsibility or accept the consequences for failing to do so.
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> . . . .

As is the case with every Justice, Thomas is the product of his unique life experiences.[44] His political ideology and judicial temperament necessarily reflect the values and beliefs that he has acquired throughout the course of his life. To understand the equal protection philosophy underpinning Thomas's conservative ideology, one must examine the values Thomas learned from his grandfather during his upbringing in Savannah, Georgia,[45] as well as Thomas's own experiences with affirmative action.

A. Callused Justice: Lessons from an Iron-Willed Man

Thomas was born in the "tiny" Georgia town of Pinpoint,[46] where he lived in his aunt's "ramshackle house" with no running water and basically no electricity for the first few years of his life.[47] But Thomas was mostly raised by his maternal grandparents in Savannah, where he and his brother were sent to live after his brother burned down his aunt's home and his mother was no longer able to support them.[48]

As an African American growing up in Savannah in the 1950s and 1960s, Thomas was a frequent victim of racism. "Many parts of

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> . . . To paraphrase Sir Winston Churchill, "we have nothing to offer, but blood, toil, tears, and sweat." There is, today, no popular market for these, though they are just as necessary now to take advantage of freedom today as they were in Churchill's day to secure freedom.

Clarence Thomas, Justice, U.S. Supreme Court, Freedom: A Responsibility, Not a Right, Kormendy Lecture Before the Ohio Northern University Pettit College of Law (Apr. 7, 1994), *in* 21 OHIO N.U. L. REV. 5, 8–11 (1994); *see also* MERIDA & FLETCHER, *supra* note 2, at 280 ("As Thomas sees it, there is no way for the nation to compensate for the sins of the past . . . . The best the nation can do from here on out is to play fair, even if it never has been before.").

Moreover, Thomas will not amend his position to reach a more favorable result for a sympathetic plaintiff. Merida and Fletcher have observed:

> Thomas says his actions are defined by the Constitution and the text of laws he is called on to interpret, not by how he feels about the plight of a plaintiff or a particular public policy issue. . . . [H]e finds the contemporary context of society all but irrelevant. Instead . . . he relies on the original intent of the founders. . . . Sometimes, Thomas explains, [consistency] puts helping someone in need or righting an obvious wrong beyond his reach.

Id. at 250.

44. *See generally* ROSEN, *supra* note 3 (discussing judicial character and temperament).

45. THOMAS, *supra* note 2, at 6–8.

46. *Id.* at 1.

47. *Id.* at 1–4. According to Thomas, life in Pinpoint was "a daily struggle for the barest of essentials." *Id.* at 3–4. The town was so poor that "when you got sick, you stayed that way, and often you died of it." *Id.*

48. *Id.* at 6–8.

Savannah . . . clung fiercely to racial segregation,"[49] forcing Thomas to live in fear as part of a subject class.[50] Thomas learned to persevere, despite the racism he encountered, because of the influence of his grandfather,[51] who was frugal, self-disciplined, and severe.[52] Thomas's grandfather ruled with an "iron will," "control[ling] every aspect" of Thomas's life.[53] In place of warmth and praise, he used insults and intimidation to teach Thomas the value of hard work, responsibility, and diligence:

> "I could do more with a teaspoon than you can do with a shovel," he snapped whenever we were shoveling dirt. "You['re] worth less than a carload of dead men." He never praised us, just as he never hugged us. Whenever my grandmother urged him to tell us that we had done a good job, he replied, "That's their responsibility. Any job worth doing is worth doing right."[54]

As a result, Thomas came to appreciate the importance of emotional strength and physical resilience. Using "hard-earned calluses" as a metaphor for life, Thomas has suggested that suffering is sometimes necessary to overcome one's weaknesses and diminish future pain:

> Our small, soft hands blistered quickly at the start of each summer, but Daddy never let us wear work gloves, which he considered a sign of weakness. After a few weeks of constant work, the bloody blisters gave way to hard-earned calluses that protected us from pain. Long

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49. *Id.* at 21.

50. *See id.* at 21–22 ("The Ku Klux Klan held a convention [in Savannah] in 1960, and 250 of its white-robed members paraded down the city's main street one Saturday afternoon. No matter how curious you might be about the way white people lived, you didn't go where you didn't belong. That was a recipe for jail, or worse.").

51. Thomas's grandfather was the only father figure in his life, as his biological father abandoned Thomas when he was an infant. *Id.* at 1–2.

52. *See id.* at 13 ("Daddy made it plain, though, that there was a connection between what he provided for us and what he required of us. He told us that if we learned how to work, we would be able to live as well as he and [my grandmother] did when we grew up."); *see also* MERIDA & FLETCHER, *supra* note 2, at 79 ("[H]e taught himself plumbing, bricklaying, carpentry."). For example, Thomas's grandfather would insist that Thomas bathe in a "teaspoon of water," wash his body with "laundry detergent instead of soap," and dry his body with a washcloth instead of a towel. THOMAS, *supra* note 2, at 17. If Thomas's grandfather was not satisfied with how clean Thomas got himself, "he finished the job himself, a terrifying experience that [Thomas] did everything [he] could to avoid." *Id.* at 17.

53. THOMAS, *supra* note 2, at 12.

54. *Id.* at 25–26.

> after the fact, it occurred to me that this was a metaphor for life—blisters come before calluses, vulnerability before maturity . . . .[55]

This metaphor is consistent with Thomas's general philosophy that coddling and overprotection can only breed dependency, undermining the development of other values that are necessary to succeed.[56] This philosophy is particularly apparent in Thomas's equal protection jurisprudence. Thomas believes that "conscious and unconscious prejudice persists in our society,"[57] and that African Americans must "gird themselves for that reality."[58] Laws that "distribute benefits on the basis of race" cannot "make us equal," Thomas explains; they "may cause [minorities] to develop dependencies or to adopt an attitude that they are 'entitled' to preferences."[59]

Thomas's grandfather also helped shape Thomas's opposition to affirmative action by instilling in Thomas an aversion to paternalistic treatment on account of his race. In his memoirs, Thomas uses a lesson from his grandfather to draw a distinction between outright bigots and those who "mask[] their contempt with elaborate displays of kindness, sympathy, or compassion":

> The contrast reminded me of Daddy's explanation of the difference between rattlesnakes and water moccasins. Both, he said, were deadly, but the rattlesnake was easier to spot. It rattled before it struck, while the water moccasin would strike silently without warning, making it more dangerous.[60]

Like segregation and outright bigotry, Thomas argues, affirmative action stamps African Americans with a "badge of inferiority."[61] He

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55. *Id.* at 25.

56. *See supra* notes 36–38 and accompanying text.

57. Georgia v. McCollum, 505 U.S. 42, 61 (1992) (Thomas, J., concurring).

58. MERIDA & FLETCHER, *supra* note 2, at 276.

59. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240–41 (1995) (Thomas, J., concurring in part and concurring in the judgment).

60. THOMAS, *supra* note 2, at 46. This comparison is strangely reminiscent of the one shared by Thurgood Marshall upon his retirement in 1990. When Justice Marshall stepped down from the Court, he was asked if President Bush should appoint an African American to replace him. With Thomas in mind, Marshall warned against "picking the wrong kind of negro" based on race alone, saying: "My dad told me way back . . . that there's no difference between a white snake and a black snake. They both bite." EDWARD LAZARUS, CLOSED CHAMBERS 449 (1999) (quoting Thurgood Marshall).

61. *Adarand*, 515 U.S. at 241; *see also* THOMAS, *supra* note 2, at 56–57 ("It seemed to me that the dependency [affirmative action] fostered might ultimately prove as diabolical as

argues that proponents of affirmative action are even more dangerous than segregationists and outright bigots because they hide their contempt behind gestures of apparent kindness:

> At least southerners were up front about their bigotry: you knew exactly where they were coming from, just like the Georgia rattlesnakes . . . . Not so the paternalistic big-city whites who offered you a helping hand so long as you were careful to agree with them . . . . Like the water moccasin they struck without warning . . . .[62]

Likewise, Thomas argues, affirmative action is potentially more destructive than segregation because it represents "a new kind of enslavement," which "ultimately relie[s] on the generosity—and the ever changing self-interests—of politicians and activists."[63]

B. The Scars of Affirmative Action

Thomas's own experiences with affirmative action also greatly influenced his conservative judicial philosophy. During college, Thomas began to question the assumption of affirmative action programs that "all blacks [are] equally disadvantaged by virtue of their race alone," regardless of socioeconomic status.[64] Likewise, Thomas grew highly skeptical of any social science theory that grouped all African Americans together, arguing that such theories inherently suggested "that blacks could never catch up to whites."[65]

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segregation, permanently condemning poor people to the lowest rungs of the socioeconomic ladder by cannibalizing the values without which they had no long-term hope of improving their lot.").

62. THOMAS, *supra* note 2, at 75–76.

63. *Id.* at 56.

64. *Id.* ("Talented blacks stuck on the bottom rung of the socioeconomic ladder clearly deserved such help, but the ones who most often took advantage of it were considerably higher up on the ladder. Most of the middle-class blacks with whom I discussed these policies argued that all blacks were equally disadvantaged by virtue of their race alone. I thought that was nonsense. . . . I also thought the same policies should be applied to similarly disadvantaged whites.").

65. *Id.* at 80. Thomas's jurisprudence on the Court has reflected this skepticism. Thomas has founded his equal protection philosophy on the belief that "individuals should be treated as *individuals*, not as members of racial or ethnic *groups*." GERBER, *supra* note 8, at 109. This belief is also evident in his commitment to individual rights, *id.* at 52, and his skepticism toward the Voting Rights Act of 1965, which he believes objectionably presupposes that all members of a particular minority group will vote in a bloc, *id.* at 87. Indeed, Thomas first quoted Harlan's conception of a colorblind Constitution in *Holder v. Hall*, 512 U.S. 874, 891 (1994) (Thomas, J.,

Perhaps because of his experiences with affirmative action, Thomas developed an aversion to group affiliations, refusing to be placed in a box based on his immutable traits.[66] Indeed, Thomas has drawn on his own experiences with affirmative action to demonstrate the debilitating effects of special treatment on account of race:

> As much as it stung to be told that I'd done well in the seminary *despite* my race, it was far worse to feel that I was now at Yale *because* of it. I sought to vanquish the perception that I was somehow inferior to my white classmates . . . . But it was futile for me to suppose that I could escape the stigmatizing effects of racial preference, and I began to fear that it would be used forever after to discount my achievements.[67]

Ultimately, Thomas's skepticism of "preferential policies" that group all African Americans together to "help [them] adjust to life after segregation," led Thomas toward conservative politics and a narrow reading of the Constitution.[68] In fact, Thomas claims that he first aligned himself with the Republican Party because of Ronald Reagan's promise "to get government off our backs and out of our lives," which Thomas greatly preferred to the "Democratic Party's ceaseless promise to legislate the problems of blacks out of existence."[69] Legislative schemes designed to favor African Americans, Thomas believed, would only promote a culture of dependency and submission, silently undermining the values necessary for African Americans to progress in society.[70] This belief would shape his jurisprudence on the Court, as his distrust of government interference matured into a strict, originalist ideology

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concurring in the judgment), to vilify what he considered a presumption of the liberal reading of the Voting Rights Act: that all members of a race "think alike," *id.*

66. *See* MERIDA & FLETCHER, *supra* note 2, at 366 ("[Thomas] seems obsessively wary of racial traps, worried that he will be put in a box reserved solely for black skin. And that's an intolerable thought for a man who sees boxes as anathema. So whatever racial pride Thomas feels is overshadowed by this greater need not to be typecast, which is a synonym for limited, which is a synonym for inferior.").

67. THOMAS, *supra* note 2, at 75.

68. *Id.* at 56.

69. *Id.* at 130.

70. *Id.* "I thought that blacks would be better off if they were left alone [by the government]," Thomas explained, "instead of being used as guinea pigs for the foolish schemes of dream-killing politicians and their ideological acolytes." *Id.*

ostensibly designed to prevent the powered from manipulating the Constitution in a way that could persecute minorities.[71]

II. HIGHER-LAW FOUNDATION

To promote his own racial philosophy, Thomas has embraced a conservative jurisprudential ideology strictly based on the founders' original intent and the Constitution's original meaning.[72] Initially, however, Thomas was uncomfortable with the idea of endorsing an ideology that had tolerated slavery and segregation.[73] Before his ideology could be consistent with his desire for racial equality, Thomas needed to reconcile his racial philosophy with the reality that the founders and the pre-Reconstruction Constitution tolerated, if not expressly endorsed, the institution of slavery.[74] Thomas found the answer in the natural law principles that Harlan and other scholars embraced at the turn of the twentieth century.[75]

Harlan, like many other nineteenth-century scholars, believed that the founders and the American people were uniquely chosen by God and that everything that happened in America was meant to fulfill a divine plan.[76] Harlan's assumption that "God had established a moral foundation for law"[77] allowed Harlan to confidently declare

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71. *See* MERIDA & FLETCHER, *supra* note 2, at 257 ("While Thomas is no advocate for affirmative action, he believes that racism is alive and inescapable. But he feels the government is ill equipped to deal with the reality or to address the legacy of discrimination. The best thing that blacks and other minorities can do, therefore, to improve their circumstance is to become self-sufficient."). Thomas recalls how a college friend once asked, "Clarence, as a member of a group that has been treated shabbily by the majority in this country, why would you want to give the government more power over your personal life?" THOMAS, *supra* note 2, at 73. The point apparently resonated with Thomas, as he explained: "[R]eal freedom mean[s] independence from government intrusion, which in turn mean[s] that you ha[ve] to take responsibility for your own decisions. When the government assumes that responsibility, it takes away your freedom—and wasn't freedom the very thing for which blacks in America were fighting?" *Id.*

72. *See* KEN FORKETT, JUDGING THOMAS 190 (2004) (describing Thomas's adoption of the natural law principles embodied in the Declaration of Independence).

73. *See id.* ("To interpret the Constitution literally, to rely on the intentions of the framers was to accept the notion that black Americans were never intended to have equal rights and freedoms."); *cf., e.g.*, THOMAS, *supra* note 2, at 88 (describing his discomfort about working for a Republican).

74. FORKETT, *supra* note 72, at 190.

75. *Id.* at 191.

76. PRZYBYSZEWSKI, *supra* note 16, at 49.

77. *Id.*

that his lonely dissents were not only correct, but also inevitable.[78] This assumption also informed Harlan's belief that the Civil War was necessary to fulfill the promises of the Declaration of Independence.[79] Harlan believed that the Declaration of Independence, which he referred to as "our political bible," was the original founding document, representing a truer expression of the founders' wishes than the Constitution.[80] For Harlan, the Reconstruction amendments constitutionalized the universal equality that the founders promised in the Declaration of Independence.[81]

Harlan's natural law principles offered Thomas an intriguing way to reconcile his commitment to equality with his originalist ideology. Through natural law, Thomas could simply denounce the institution of slavery as repugnant to the founders' words and principles:

> I led my staffers . . . in discussions of the natural-law philosophy with which the Declaration of Independence, America's first founding document, is permeated. "All men are created equal," Thomas Jefferson had written in 1776. "They are endowed by their Creator with certain unalienable Rights." That's natural law in a nutshell: if all men are created equal, then no man can own another man, and we can only be governed by our consent. How, then, could a country founded on those principles have permitted slavery and segregation to exist? The answer was that it couldn't—not without being untrue to its own ideals.[82]

To infuse natural law principles into his own ideology, Thomas embraced a form of originalism that is rooted in the *principles* of the founders rather than solely the practices of the founders.[83] This brand

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78. *See id.* at 51 ("Perhaps this faith was what allowed Harlan to joke about his dissents; not only did he know that he was right, but also he knew that right was unchanging and would prevail eventually.").

79. *See id.* at 62–64 ("In order for all Americans to claim civil rights, the Civil War had to be fought and the slaves freed. Far from disrupting the course of American history, these events fulfilled the country's providential mission. The emancipation of blacks answered the wish of the founders.").

80. *Id.* at 64 (quoting John Marshall Harlan, Remarks at the Unveiling of Memorial Tablets of Former Presidents of Centre College (June 19, 1891)).

81. *Id.* at 49.

82. THOMAS, *supra* note 2, at 188.

83. *See* GERBER, *supra* note 8, at 103–04 (describing this approach as "liberal," as opposed to "conservative," originalism); *see also* Jeffrey Rosen, *The Color-Blind Court*, 45 AM. U. L. REV. 791 (1996) (critiquing both liberals' and conservatives' interpretations of the Reconstruction amendments). For further elaboration on the differences between "liberal" and

of originalism allowed Thomas to use the principles that the founders expressed in the Declaration of Independence to color the meaning of the founders' words in the Constitution.[84] Thus, Thomas was able to adopt a natural law philosophy reminiscent of that to which Harlan and other nineteenth-century scholars subscribed.

Like Harlan, Thomas views the Declaration of Independence as a truer expression of the framers' ideals—ideals that were finally realized when the Reconstruction amendments were added to the Constitution following the Civil War.[85] Accordingly, Thomas believes that the Reconstruction amendments injected into the Constitution the innate right to equality that the founders promised in the Declaration of Independence.[86] In doing so, Thomas argues, the Reconstruction amendments purged the Constitution of the taint of slavery, rendering the Constitution colorblind.[87]

Thomas has also praised Harlan's understanding of the "'higher law' background of the Constitution."[88] He appears to share Harlan's belief that there is a divine foundation for the law.[89] Like Harlan, Thomas is a deeply religious individual.[90] His belief in higher law may, as it did for Harlan, bolster Thomas's confidence in the correctness and inevitability of his own separate opinions.

"conservative" originalism, see SCOTT DOUGLAS GERBER, TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION 1–8 (1995).

84. GERBER, *supra* note 8, at 103–04; John C. Eastman, *Taking Justice Thomas Seriously*, 2 GREEN BAG 2D 425, 426 (1999) (book review) ("[I]t is a jurisprudence rooted in the self-evident truths of human nature and the inalienable rights derived from that nature, as articulated in the Declaration of Independence.").

85. *See* Thomas, *supra* note 8, at 994 ("The original Constitution's guarantee clause, read in light of the Declaration of Independence, points in the direction of abolition . . . . The proper way to interpret the Civil War amendments is as extensions of the promise of the original Constitution which in turn was intended to fulfill the promise of the Declaration.").

86. *Id.*

87. *See id.* at 995 ("[T]oo many of us today ignore . . . Harlan's splendid exegesis of the 'original intention' of the Civil War amendments . . . . The first principles of equality and liberty . . . . could lead us above petty squabbling over 'quotas,' 'affirmative action,' and race-conscious remedies for social ills.").

88. *Id.* at 993.

89. *See, e.g.*, *id.* at 995 (linking natural law with the "laws of nature and of nature's God" referred to in the Declaration of Independence).

90. *See* MERIDA & FLETCHER, *supra* note 2, at 335–38 (describing the "central role of religion in [Thomas's] life").

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Thomas has used natural law to both affirm and legitimate his conservative ideology. Natural law represents "the perfect expression of [Thomas's] desire to transcend his concerns for race and civil rights," allowing Thomas to both "preserve[] his care for the fate of Black Americans" and "speak intelligently and in a principled fashion about politics and society in general."[91] Moreover, as Part III demonstrates, it has offered Thomas a way to glorify his fight for his own racial philosophy.

III. HARLAN'S COLORBLIND CONSTITUTION

Whereas the natural law principles Thomas borrowed from Harlan and other nineteenth-century scholars have allowed Thomas to legitimate his racial philosophy, Harlan's dissent in *Plessy* has provided Thomas the ammunition to fight for it. In Thomas's quest for racial equality, Harlan's colorblind Constitution has become his rallying cry.

A. Harlan's Dissent in Plessy

Plessy examined whether a Louisiana statute that required railroad companies to segregate passengers on account of their race into *separate but equal* seating accommodations was constitutional.[92] An eight-judge majority upheld the statute, reasoning that, so long as the accommodations are equal, racial segregation does not offend the Fourteenth Amendment.[93] The majority dismissed the argument that the "enforced separation of the two races stamps the colored race with a badge of inferiority," emphasizing the facial neutrality of the act.[94] If the enforced separation did produce a feeling of inferiority, the majority assured, "it [was] not by reason of anything found in the

91. Ken Masugi, *Natural Right and Oversight: The Use and Abuse of "Natural Law" in the Clarence Thomas Hearings*, 9 POL. COMM. 231, 232–33 (1992).

92. Plessy v. Ferguson, 163 U.S. 537, 540 (1896).

93. *Id.* at 544. Although "the object of the [Fourteenth Amendment] was undoubtedly to enforce the absolute equality of the two races before the law," the majority explained, "it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either." *Id.*

94. *Id.* at 551.

act, but solely because the colored race [had chosen] to put that construction upon it."[95]

In his lonely dissent, Harlan interpreted the Fourteenth Amendment much more expansively than the majority. According to Harlan, the Fourteenth Amendment includes in it not only "the right to exemption from unfriendly legislation against [African Americans] distinctively as colored," but also the right to "exemption from legal discriminations, implying inferiority in civil society . . . which are steps towards reducing them to the condition of a subject race."[96] Harlan refused to ignore the clear discriminatory purpose behind the Louisiana statute's neutral guise.[97] Because Louisiana *intended* to reduce African Americans to "the condition of a subject race," the statute offended the Fourteenth Amendment.[98]

Harlan's dissent views the Fourteenth Amendment as a necessary shield to protect African Americans from laws intended to subordinate them. It was in this vein that Harlan incorporated his conception of a colorblind Constitution:

> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. *Our Constitution is color-blind, and neither knows nor tolerates classes among citizens*.[99]

The rhetorical force of the last sentence, standing alone, may undercut the larger point that Harlan was trying to make. The sentence follows logically from Harlan's discussion of a "superior, dominant, ruling class," and even designates "classes among citizens" as the evil that Harlan's "color-blind" Constitution "neither knows

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95. *Id.*

96. *Id.* at 556 (Harlan, J., dissenting).

97. *See id.* at 557 ("Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons.").

98. *Id.* at 556; *accord id.* at 560 (condemning the statute's "real meaning": that "colored citizens are so inferior . . . that they cannot be allowed to sit in public coaches occupied by white citizens").

99. *Id.* at 559 (emphasis added).

nor tolerates."[100] In context, the sentence does not necessarily suggest that *every classification* on account of race would be unconstitutional. Rather, it appears to speak only to racial classifications intended to render one race subordinate to another.[101]

Thus, in applying Harlan's "color-blind" language to a contemporary racial classification, perhaps the debate should be over whether the classification in question was intended to and does render one race subordinate to another rather than whether the classification was made on account of race.

Regardless of what Harlan originally meant when he declared the Constitution "color-blind," however, Harlan's language has become the rallying cry for those who argue that all classifications on the basis of race, whether malicious or benign, are equally offensive to the Constitution.[102] And Thomas has emerged on the Court as the most vocal proponent of this interpretation of a colorblind Constitution.

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100. *Id.*

101. For a general discussion of the differences between the antisubordination and anticlassification approaches to interpreting the Fourteenth Amendment, see Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470 (2004).

102. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 355–56 (1978) (Brennan, J., concurring in the judgment in part and dissenting in part) (using Harlan's language to summarize the anticlassification approach). In *Bakke*, proponents of the antisubordination approach abandoned Harlan's colorblind language. Writing on behalf of himself and three other Justices, Justice Brennan pronounced:

> The assertion of human equality is closely associated with the proposition that differences in color or creed, birth or status, are neither significant nor relevant to the way in which persons should be treated. Nonetheless, the position that such factors must be "constitutionally an irrelevance," summed up by the shorthand phrase "[o]ur Constitution is color-blind," has never been adopted by this Court as the proper meaning of the Equal Protection Clause. Indeed, we have expressly rejected this proposition on a number of occasions.

Id. (alteration in original) (citation omitted) (quoting *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting)).

Those who view the Fourteenth Amendment as an antisubordination doctrine generally disfavor the anticlassification approach associated with Harlan's colorblind language. *See, e.g.*, Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CAL. L. REV. 77, 106 (2000) ("Because color blindness discourse defines 'discrimination on the basis of race' in highly specialized ways—as a practice of group-categorical differentiation that serves no instrumentally relevant end—color blindness discourse can both discredit and rationalize practices that perpetuate racial stratification.").

B. Thomas's Colorblind Constitution

Thomas was not the first Justice to quote Harlan's colorblind rhetoric, nor was he the first Justice to argue that all classifications made on the basis of race, including those intended to benefit minorities, require the strictest of scrutiny.[103] The legality of affirmative action was fiercely debated from the start,[104] and the dispute over what standard should be used to evaluate affirmative action programs was already heated by the time Thomas joined the Court.[105]

In many ways, however, Thomas has appropriated Harlan's colorblind Constitution, embracing not only Harlan's words, but also what Thomas portrays to be Harlan's underlying principles. To fully appreciate the genius of Harlan's dissent, Thomas argues, Harlan's words must be read in light of Harlan's belief in "the 'higher law' background of the Constitution."[106] Harlan understood that "the Founders' constitutional principles lay at the heart of the segregation issue,"[107] and that understanding, according to Thomas, was central to Harlan's invocation of a colorblind Constitution.[108] Thus, Thomas has read Harlan's colorblind Constitution to include not only Harlan's

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103. *Cf., e.g.*, United Steelworkers v. Weber, 443 U.S. 193, 219–22 (1979) (Rehnquist, J., dissenting) (arguing against special treatment for minority applicants on the grounds that such treatment constitutes impermissible race discrimination under Title VII).

104. *See id.* The first case that the Court heard on the constitutionality of affirmative action was *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (per curiam) (5–4 decision), although the Court ultimately dismissed the case on procedural grounds. In *DeFunis*, the plaintiff, a white male, claimed that the University of Washington Law School's affirmative action program denied him admission on account of his race in violation of the Equal Protection Clause. *Id.* at 314; *see also id.* at 320–22 (Douglas, J., dissenting) (describing the law school's program). The issue was hotly debated at the time, as several Justices noted in their dissents. *See id.* at 320 (Douglas, J., dissenting) ("[B]ecause of the significance of the issues raised . . . it is important to reach the merits."); *id.* at 350 (Brennan, J., dissenting) ("The constitutional issues which are avoided today concern vast numbers of people, organizations, and colleges and universities, as evidenced by the filing of twenty-six *amicus curiae* briefs. Few constitutional questions in recent history have stirred as much debate, and they will not disappear.").

105. *Compare* Fullilove v. Klutznick, 448 U.S. 448, 472 (1980) (requiring only intermediate scrutiny for federal affirmative action programs), *and* Metro Broad., Inc. v. FCC, 497 U.S. 547, 564 (1990) (same), *overruled by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226–27 (1995), *with* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion) (advocating strict scrutiny for state and local affirmative action programs).

106. Thomas, *supra* note 8, at 993.

107. *Id.* at 990.

108. *See* Plessy v. Ferguson, 163 U.S. 537, 559 (Harlan, J., dissenting) ("Our Constitution is color-blind and neither knows nor tolerates classes among citizens.").

rhetoric but also his own interpretation of Harlan's natural law principles—the very principles that Thomas has embraced to justify his conservative ideology.[109] Armed with his own construction of Harlan's colorblind Constitution, Thomas has taken aim at the one case most often associated with racial equality: *Brown v. Board of Education*.

C. *Redefining* Brown *and the Modern Era of Equal Protection Jurisprudence*

The eloquence of Harlan's dissent in *Plessy*, along with Harlan's prediction that history would judge *Plessy*'s holding unfavorably,[110] rendered the dissent something of a war cry for the pre-*Brown* civil rights movement. Fifty years after *Plessy* was decided, for example, Harlan's dissent "became a kind of bible" for Thurgood Marshall,

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109. *See* discussion *supra* Part II. Although Thomas has used Harlan's words and ideas to reconcile inconsistencies in his own ideology, Thomas has conveniently ignored the parts of Harlan's character and jurisprudence that would undermine Thomas's construction of a colorblind Constitution. One such aspect of Harlan's character is Harlan's paternalistic attitude toward civil rights. *See* PRZYBYSZEWSKI, *supra* note 16, at 18 (attributing Harlan's "demand for the legal equality of blacks" to his paternalistic "sense of white obligation to black dependents"). Despite Harlan's civil rights advocacy on the Court, he was nonetheless a slave owner until the Civil War. *Id.* at 26–27. The Harlan family supported gradual emancipation (as opposed to abrupt abolition), viewing slavery as "a form of social welfare," *id.* at 20, 22, in which Caucasians and African Americans "liv[ed] in stratified yet mutually devoted company," because of "a sense of white obligation to black dependents," *id.* at 18. Harlan's treatment of "gifted slave[s]," to whom he offered freedom, confirms this perspective. *See id.* at 23 (implying that Harlan felt average slaves were not competent to live as freemen). It is a perspective that unquestionably assumes that the races are fundamentally different—an assumption that Harlan continued to rely on during his tenure on the Court and even expressed in his dissent in *Plessy*:

> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty.

Plessy, 163 U.S. at 559 (Harlan, J., dissenting). Yet, as Section C demonstrates, one of Thomas's principal arguments for a colorblind Constitution is that racially preferential treatment is patronizing and paternalistic, implying that African Americans are inherently inferior to Caucasians. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in the judgment) ("There can be no doubt that the paternalism that appears to lie at the heart of this [racial set-aside] program is at war with the principle of inherent equality that underlies and infuses our Constitution."). It is ironic that Thomas has chosen to borrow much of his civil rights approach from a Justice who, in a region filled with rattlesnakes, was the quintessential water moccasin. *See supra* notes 60–62 and accompanying text.

110. *See Plessy*, 163 U.S. at 559 (Harlan, J., dissenting) ("In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case.").

who "liked to read it aloud for inspiration as he prepared to argue *Brown v. Board of Education*."[111]

When *Brown* was decided in 1954,[112] however, the short, unanimous decision did not fully vindicate Harlan's "color-blind" Constitution. *Brown* held that state laws requiring racially segregated schools violate the Equal Protection Clause of the Fourteenth Amendment,[113] expressly overruling *Plessy* in the field of public education.[114] The *Brown* Court did not, however, specifically quote or cite Harlan's dissent, leaving it unclear which elements of the dissent, if any, had actually influenced the Court's reasoning.

Furthermore, the Court's holding in *Brown* was much narrower than Harlan's argument in *Plessy*. Neither the text nor the reasoning of *Brown* appears to overrule the "separate but equal" doctrine outside the context of education. Rather, *Brown* relied on social science research specific to the field of public education to conclude that "[t]o separate [African-American children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community."[115] Likewise, the decision focused on the "importance of education to our democratic society,"[116] and the Court's holding was narrowly circumscribed to that end. The Court held that "in the *field of public education*, the doctrine of 'separate but equal' has no place. Separate *educational facilities* are inherently unequal."[117] Thus, although *Brown* secured Harlan's legacy as a great and prophetic dissenter,[118] the decision left Harlan's dissent in *Plessy* unsatisfied.

Despite the education-specific nature of *Brown*, the Court subsequently used the decision, without further explanation, to strike down state laws mandating segregation of other public facilities.[119] In

111. ROSEN, *supra* note 3, at 125–26.

112. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

113. *Id.* at 495; *see also* Bolling v. Sharpe, 347 U.S. 497, 500 (prohibiting the federal government from maintaining racially segregated schools on the grounds that such federal action violates the "due process of law guaranteed by the Fifth Amendment").

114. *Brown*, 347 U.S. at 494–95 ("Any language in *Plessy v. Ferguson* contrary to this [holding] is rejected.").

115. *Id.* at 494.

116. *Id.* at 493.

117. *Id.* at 495 (emphases added).

118. *See* discussion *infra* Part IV.B.

119. *See, e.g.*, Johnson v. Virginia, 373 U.S. 61 (1963) (per curiam) (courtroom seating); Turner v. City of Memphis, 369 U.S. 350 (1962) (per curiam) (public restaurants); Gayle v.

doing so, the Court interpreted *Brown* to stand for the principle that *all* separate facilities are inherently unequal, overruling *Plessy* entirely[120] and "usher[ing] in the modern era of equal protection jurisprudence."[121]

Because the Court never explained why segregation outside the field of public education was unconstitutional, however, the Court left the meaning of *Brown*, and thus the rationale for the modern era of equal protection jurisprudence, both unclear and "uniquely malleable."[122] Once it became necessary to sculpt the contours of equal protection, Harlan's dissent in *Plessy*, which *did* articulate a rationale for why all government-enforced segregation is unconstitutional, became an ironic[123] source of ammunition against the antisubordination approach. This Section argues that Thomas has capitalized on *Brown*'s malleability, using his own equal protection philosophy and Harlan's colorblind rhetoric to redefine the rationale for the modern era of equal protection jurisprudence.

1. Brown*'s "Great Flaw."* In 1987, three years before his nomination to the Court, Thomas published an article in the *Howard Law Journal* calling *Brown* and all of its progeny a "missed opportunity."[124] *Brown*'s "great flaw," Thomas argued, "is that it did not rely on Harlan's dissent in *Plessy*,"[125] which correctly called for a "color-blind" Constitution.[126] This misstep, Thomas suggested, not

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Browder, 352 U.S. 903 (1956) (per curiam) (municipal bus system); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (per curiam) (municipal golf course); Mayor of Balt. v. Dawson, 350 U.S. 877 (1955) (per curiam) (public beaches, bathhouses, and swimming pools).

120. *See* KULL, *supra* note 14, at 161–62 (describing the Court's unexplained extension of *Brown* to proscribe all de jure segregation).

121. CHEMERINSKY, *supra* note 14, at 617. Prior to *Brown*, the Court had interpreted the Equal Protection Clause very narrowly, limiting the clause's scope to bar discrimination only against African Americans. *See, e.g.*, Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1872) ("We doubt very much whether any action of a State not directed by way of discrimination against [African Americans] as a class, or on account of their race, will ever be held to come within the purview of this provision.").

122. KULL, *supra* note 14, at 162.

123. *See supra* note 109 and accompanying text.

124. Thomas, *supra* note 8, at 991.

125. *Id.* at 990.

126. *See id.* at 992 (arguing that "Justice Harlan's *Plessy* opinion is a good example of thinking in the spirit of the founding" but "[l]argely as a result of the dubious reasoning of the post-*Plessy* Court, and a national indifference to the rights of all Americans, Justice Harlan's argument that the Constitution is 'color-blind' did not rally supporters").

only abandoned the founders' constitutional principle,[127] it also opened the door for a new generation of racial subordination in the form of affirmative action.[128] Thomas claimed that had the *Brown* Court embraced Harlan's conception of a colorblind Constitution, instead of relying on social science, *Brown* could have represented "reason rather than sentiment," "justice rather than sensitivity," and "freedom rather than dependence."[129] To correct this "cynical rejection of 'the laws of nature and of nature's God,'"[130] Thomas argued, the Court must mend the errors of the *Brown* Court, and replace "the Warren opinion" with the spirit of Harlan's incisive dissent.[131]

2. *Mending the Errors of the* Brown *Court.* In his confirmation hearing, Thomas dismissed his prior criticism of *Brown* and its progeny as the ponderings of "a part-time political theorist."[132] His previous theorizing, however, proved indicative of his subsequent civil rights jurisprudence. During his first sixteen terms on the Court, Thomas has attempted to remedy *Brown*'s "great flaw," writing passionate separate opinions that reject the parts of *Brown* he disagrees with in favor of his own beliefs about what the *Brown* Court should have held. In the process, Thomas has gradually aligned Harlan's colorblind rhetoric with his own equal protection philosophy.

In *Missouri v. Jenkins*,[133] Thomas became the first Supreme Court Justice to openly criticize the reasoning of *Brown*.[134] Although

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127. Thomas contended that

> [t]he *Brown* psychology makes the legal and social environment all-controlling: "the feeling of inferiority" or "the sense of inferiority" is the problem. . . . Thus, the *Brown* focus on environment overlooks the real problem with segregation, its origin in slavery, which was at fundamental odds with the founding principles.

Id. at 991.

128. *See id.* at 995 ("The first principles of equality and liberty should inspire our political and constitutional thinking. It could lead us above petty squabbling over 'quotas,' 'affirmative action,' and race-conscious remedies for social ills.").

129. *Id.* at 991.

130. *Id.* at 995 (quoting THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776)).

131. *Id.* at 991–92.

132. GERBER, *supra* note 8, at 52–53 (citing *Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 102d Cong. 237 (1991) (statement of Clarence Thomas)).

133. Missouri v. Jenkins, 515 U.S. 70 (1995).

134. GERBER, *supra* note 8, at 79.

Thomas agreed with the majority that a district court could not order an interdistrict remedy to promote integration unless all of the districts involved had participated in the constitutional violation, Thomas wrote a concurring opinion denouncing *Brown*'s use of social science research as a distraction from the larger principles that *Brown* was meant to represent.[135] *Brown*, Thomas claimed, "did not need to rely upon any psychological or social-science research to announce the simple, yet fundamental, truth that the government cannot discriminate among its citizens on the basis of race."[136]

While disparaging *Brown*'s use of social science research, however, Thomas mostly directed his criticism at the ways in which *Brown* has been interpreted. For example, Thomas criticized the district court's reliance on social science research, attributing the court's reliance to a misreading of *Brown*:

> Segregation was not unconstitutional because it might have caused psychological feelings of inferiority. . . . Psychological injury or benefit is irrelevant to the question of whether state actors have engaged in intentional discrimination—the critical inquiry for ascertaining violations of the Equal Protection Clause.[137]

Thomas also took issue with the district court's finding that "racial imbalances . . . inflict harm on black students,"[138] denouncing the court's assumption that "anything that is predominantly black must be inferior."[139] To Thomas, the district court's position appeared to rest on the idea that "blacks cannot succeed without the benefit of the company of whites."[140] Thomas used the court's assumption to condemn the "notion of Black inferiority that *Brown* had come to represent."[141]

In directing the majority of his criticism at the district court's interpretation of *Brown*, instead of at *Brown* itself, Thomas was able to disparage the parts of *Brown* he disagrees with while reading his own principles into *Brown*'s ever-malleable shell:

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135. *Jenkins*, 515 U.S. at 114 (Thomas, J., concurring).
136. *Id.* at 120.
137. *Id.* at 119–21.
138. *Id.* at 118.
139. *Id.* at 114.
140. *Id.* at 119.
141. GERBER, *supra* note 8, at 79.

> As the Court's unanimous opinion [in *Brown*] indicated: "[I]n the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." At the heart of this interpretation of the Equal Protection Clause lies the principle that the government must treat citizens as individuals, and not as members of racial, ethnic, or religious groups. It is for this reason that we must subject all racial classifications to the strictest of scrutiny, which . . . has [almost always] proven automatically fatal.[142]

Thus, in *Jenkins*, Thomas read *Brown* to mean that the Equal Protection Clause categorically forbids the government from treating individuals "as members of racial . . . groups" unless the "strictest of scrutiny" proves it necessary.[143] This reading of *Brown* would soon become the law.

That same day, in *Adarand Constructors, Inc. v. Pena*,[144] Thomas cast the crucial fifth vote to hold that *all* government classifications on the basis of race, whether invidious or benign, must be reviewed under strict scrutiny.[145] In doing so, the Court overruled *Metro Broadcasting, Inc. v. FCC*,[146] which, five years earlier, had held that federal affirmative action programs only required intermediate scrutiny.[147]

In his separate opinion, Thomas came one step closer to uniting his own equal protection philosophy with Harlan's colorblind rhetoric. "There can be no doubt," Thomas insisted, "that the paternalism that appears to lie at the heart of this [racial set-aside] program is at war with the principle of inherent equality that underlies and infuses our Constitution."[148] To support this assertion,

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142. *Jenkins*, 515 U.S. at 120–21 (Thomas, J., concurring) (citation omitted).

143. *Id.*

144. Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

145. *Id.* at 227 (Thomas, J., concurring in part and concurring in the judgment). Although *Adarand* was the first case to hold that strict scrutiny applies to federal affirmative action programs, *id.*, the Court had previously held that strict scrutiny applies to state and local affirmative action programs, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 490–91 (1989) (plurality opinion).

146. Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990), *overruled by Adarand*, 515 U.S. at 226–27.

147. *Id.* at 564–65; *see also* TERRY EASTLAND, ENDING AFFIRMATIVE ACTION: THE CASE FOR COLORBLIND JUSTICE 127 (1997) (describing how Thomas, in replacing Marshall, joined the four dissenting Justices from *Metro Broadcasting* to overturn the precedent).

148. *Adarand*, 515 U.S at 240 (Thomas, J., concurring in part and concurring in the judgment).

Thomas cited the words of the Declaration of Independence.[149] In doing so, Thomas relied on the natural law principles that inspired his interpretation of Harlan's colorblind Constitution.[150]

Eight years later, in *Grutter v. Bollinger*,[151] Thomas relied on Harlan's colorblind rhetoric directly to make the same general point.[152] Arguing that the University of Michigan's affirmative action program failed strict scrutiny because the state's interest in a diverse student body could not be considered compelling, Thomas reiterated his belief that racial classifications intended to benefit minorities are just as offensive as those intended to burden minorities.[153] Thomas concluded his thirty-page separate opinion with a nod toward both the Declaration of Independence and Harlan's colorblind Constitution: "For the immediate future," Thomas wrote, "the majority has placed its *imprimatur* on [affirmative action,] a practice that can only weaken the principle of equality embodied in the Declaration of Independence and the Equal Protection Clause. 'Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.'"[154] Thus, Thomas read his own opposition to affirmative action into Harlan's colorblind Constitution, aligning his own natural rights principles with those of Harlan.

In 2007, in *Parents Involved in Community Schools v. Seattle School District No. 1*,[155] Thomas broadcast Harlan's colorblind rhetoric with a renewed intensity, practically reading Harlan's words directly into the meaning of *Brown*. Although Thomas joined the

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149. *Id.* ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." (quoting THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776))).

150. *See supra* notes 106–09 and accompanying text.

151. Grutter v. Bollinger, 539 U.S. 306 (2003).

152. *Id.* at 349 (Thomas, J., concurring in part and dissenting in part).

153. Thomas argued that

> [t]he Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all. "Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation's understanding that such classifications ultimately have a destructive impact on the individual and our society."

Id. at 353 (quoting *Adarand*, 515 U.S. at 240 (Thomas, J., concurring in part and concurring in the judgment)).

154. *Id.* at 378 (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

155. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007).

opinion of the Court, he wrote separately to address additional points raised by the dissent.[156] In contrast to the dissenting Justices, who Thomas suggested "[d]isfavor[ed] a colorblind interpretation of the Constitution,"[157] Thomas wholeheartedly endorsed Harlan's colorblind words:

> Most of the dissent's criticisms of today's result can be traced to its rejection of the color-blind Constitution. The dissent attempts to marginalize the notion of a color-blind Constitution by consigning it to me and Members of today's plurality. But I am quite comfortable in the company I keep. My view of the Constitution is Justice Harlan's view in *Plessy:* "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." And my view was the rallying cry for the lawyers who litigated *Brown*.[158]

This quote illustrates how Thomas has entirely equated his own equal protection philosophy with the sentiment Harlan expressed when he declared the Constitution "color-blind." His view of the Constitution, Thomas insists, *is* Harlan's colorblind Constitution.

Additionally, this quote demonstrates the utility of Harlan's words. Although Thomas has mostly employed Harlan's words to fight for his own equal protection philosophy, he has also reached for Harlan's words to shield himself from the counterassaults of his ideological opponents. In rejecting Harlan's colorblind Constitution, Thomas appeared to suggest, the dissenters were directly assaulting not only Harlan's dissent in *Plessy* but also the views of civil rights icon Thurgood Marshall and, by association, the meaning of *Brown*. Moreover, Thomas argued, the dissenters in *Parents Involved* were using the very arguments endorsed by the segregationists to do so.[159]

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156. *Id.* at 2768 (Thomas, J., concurring). Justice Breyer wrote this dissent, which Justices Stevens, Souter, and Ginsburg joined. *Id.* at 2800 (Breyer, J., dissenting).

157. *Id.* at 2768 (Thomas, J., concurring).

158. *Id.* at 2782 (footnotes omitted) (citations omitted).

159. Thomas wrote:

> The dissent appears to pin its interpretation of the Equal Protection Clause to current societal practice and expectations, deference to local officials, likely practical consequences, and reliance on previous statements from this and other courts. Such a view was ascendant in this Court's jurisprudence for several decades. It first appeared in *Plessy* . . . .
>
> The segregationists in *Brown* embraced the arguments the Court endorsed in *Plessy*. Though *Brown* decisively rejected those arguments, today's dissent replicates them to a distressing extent.

Id. at 2783–85.

"What was wrong in 1954," Thomas argued, "cannot be right today."[160]

After Thomas aligned the dissenters with the segregationists of *Plessy* and *Brown* and thus himself with the opponents of segregation who righteously challenged the status quo, he turned to Harlan's colorblind rhetoric to sweep away whatever might remain of *Brown*'s emphasis on social science:

> Although no such distinction is apparent in the Fourteenth Amendment, the dissent would constitutionalize today's faddish social theories that embrace that distinction. The Constitution is not that malleable. Even if current social theories favor classroom racial engineering as necessary to "solve the problems at hand," the Constitution enshrines principles independent of social theories.[161]

To support his assertion that "the Constitution enshrines principles independent of social theories," Thomas cited the words of Harlan's dissent in *Plessy*, including Harlan's colorblind language.[162] Thus, in a matter of pages, Thomas used Harlan's words both to accuse the dissenters of abandoning the sentiment of *Brown* and to berate the dissenters for using a strategy that the *Brown* Court actually employed.[163]

Thomas concluded his concurrence with a final invocation of Harlan's colorblind Constitution: "The plans before us base school assignment decisions on students' race. Because 'our Constitution is color-blind, and neither knows nor tolerates classes among citizens,' such race-based decisionmaking is unconstitutional."[164]

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160. *Id.* at 2786.

161. *Id.* at 2787 (citation omitted).

162. Thomas quoted Justice Harlan:

> "The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time . . . . But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. . . . Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."

Id. (alteration in original) (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

163. *See supra* notes 115–18 and accompanying text.

164. *Parents Involved*, 127 S. Ct. at 2788 (Thomas, J., concurring) (quoting *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting)).

* * *

Although, according to Thomas, "[t]he Constitution is not that malleable,"[165] *Brown* and its progeny have proven much easier to manipulate.[166] As best illustrated by *Parents Involved in Community Schools*, Thomas has conclusively aligned himself with Harlan's colorblind Constitution, using the words of Harlan's dissent in *Plessy* to mold the very meaning of *Brown* into the shape of his own jurisprudence.[167] In doing so, Thomas has attempted to replace the portions of *Brown* that he has long despised, particularly its reliance on social science research, with his own ideas of what the landmark decision should have held. Moreover, Thomas has attempted to do so through a sentence that the *Brown* Court never explicitly embraced,[168] employed in a manner that Harlan may not have intended.[169]

IV. OUTLIVING THE WATER MOCCASINS[170]

In addition to Harlan's natural rights principles and colorblind Constitution, Thomas has also latched onto Harlan's image as a great and prophetic dissenter. For Thomas, Harlan represents the reality that "[a] minority opinion on the court today can be a majority opinion a generation from now."[171] This Part contends that Thomas hopes that the ideas expressed in his separate opinions will outlive those of his ideological opponents and secure his legacy as the next great civil rights dissenter.[172]

A. The Next "Mr. Civil Rights"?[173]

If Thurgood Marshall bequeathed to Thomas his role as a great champion of civil rights,[174] Thomas has been a very ungracious heir. Thomas has not just strayed from Marshall's path—he has led the

165. *Id.* at 2787.

166. *See supra* text accompanying note 122.

167. *See supra* notes 153–64.

168. *See supra* text accompanying notes 112–18.

169. *See supra* notes 97–102, 109 and accompanying text.

170. *See supra* notes 60–62 and accompanying text.

171. MERIDA & FLETCHER, *supra* note 2, at 250.

172. The term "dissenter" is used liberally here as most of Thomas's civil rights opinions are actually concurring opinions. *See supra* Part III.C.

173. *See supra* text accompanying note 31.

174. *See supra* text accompanying notes 27–34.

charge to erase Marshall's footsteps.[175] To promote what he believes to be in the best interest of African Americans, Thomas has consistently opposed the use of race-conscious means to eradicate the remnants of segregation, eroding many of the "hard-earned advances [Marshall] had helped bring about."[176] His "every vote—even his every public utterance, written or spoken—seems designed to outrage the liberal establishment that so venerated Marshall."[177] As a result, Thomas has been alienated by the African-American community,[178] dismissed as a sell-out, a traitor, and an "Uncle Tom."[179] As Thomas himself explained, "These people are mad because I'm in Thurgood Marshall's seat."[180]

The contrast between Thomas and his renowned predecessor, however, is merely one symbol of the larger reason many African Americans begrudge him: Thomas is an African American who has been given a rare opportunity to advance an African-American agenda, and he has instead chosen to chart a judicial path that many view as directly contrary to the interests of the African-American community.[181] Indeed, Thomas is perhaps most famous for his passionate opposition to affirmative action, the "one big issue for most black people."[182] Not only has Thomas openly opposed

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175. MERIDA & FLETCHER, *supra* note 2, at 262.

176. *Id.*

177. Jeffrey Toobin, *The Burden of Clarence Thomas*, NEW YORKER, Sept. 27, 1993, at 38, 41, 42.

178. For a general discussion on the complex alienation Thomas has faced within the Black community, see Michael Dehaven Newsom, *Clarence Thomas, Victim? Perhaps, and Victimizer? Yes—A Study in Social and Racial Alienation from African-Americans*, 48 ST. LOUIS U. L.J. 327 (2004).

179. MERIDA & FLETCHER, *supra* note 2, at 3, 12, 19. In 1998, the Joint Center for Political and Economic Studies determined that Thomas had only a 32 percent favorability rating among African Americans, lower than any other "prominent black figure" the center's political analyst had ever examined. *Id.* at 4.

180. *Id.* at 271 (quoting Clarence Thomas). *But cf. id.* at 280 ("Clarence Thomas is not looking to be a black leader. I'm sure he never applied. He will never fit in Thurgood Marshall's shoes. Those are not the shoes he wants to wear." (quoting Donna Brazile)).

181. *See id.* at 19 ("Racial disillusionment is the common theme in all these demonstrations—not ideology, not politics, but the seething sense that one of the potential bright lights of the race has rejected his chance to shine.").

182. *Id.* at 375 ("The civil rights movement has been boiled down to one big issue for most black people . . . affirmative action. . . . It's like riding on the anti-gay marriage platform in Greenwich Village or Provincetown. . . . You're going to be surprised when people are angry at you?" (quoting Henry Louis Gates Jr., Director of Harvard's W.E.B. Du Bois Institute for African and African-American Research)).

affirmative action, but he appears to go out of his way to decry many civil rights legal principles—principles that are close to the hearts of most African Americans.

Moreover, some contend that Thomas's civil rights opinions are bolder than other Justices, because he is willing to say things that "no one [else] on the Court has the guts to say."[183] Even in cases in which Thomas votes with the majority, as he did in *Adarand*, *Jenkins*, and *Parents Involved in Community Schools*,[184] he often writes separately to express positions that are more absolute than those taken by the majority.[185] In *Bush v. Vera*,[186] for example, Thomas was the only Justice on the Court who was unwilling to assume, for the purposes of the present case, that it was constitutional to intentionally create majority-minority districts.[187] Thomas's bold separate opinions have led some to characterize his civil rights jurisprudence as radical and extreme.[188] As Justice Stevens explained:

> I would not find JUSTICE THOMAS' *extreme* proposition—that there is a moral and constitutional equivalence between an attempt to subjugate and an attempt to redress the effects of a caste system—at all persuasive. It is one thing to question the wisdom of affirmative-

183. GERBER, *supra* note 8, at 102 (quoting Robert Marquand, *Thomas Leads Court's Lean to the Right*, CHRISTIAN SCI. MONITOR, June 26, 1995, at 1). As discussed in Part III.C, for example, Thomas was the first Justice to openly criticize the reasoning of *Brown*. *See* Missouri v. Jenkins, 515 U.S. 70, 114 (1995) (Thomas, J., concurring) (criticizing the *Brown* Court for relying on social science to reach the conclusion that segregation in public schools is unconstitutional).

184. *See* discussion *supra* Part III.C.

185. *E.g.*, Richard J. Dougherty, Essay, *A Response to Originalism and Precedent: Principles and Practices in the Application of Stare Decisis*, 6 AVE MARIA L. REV. 155, 170–71 (2007) (describing how Thomas often writes separately to distinguish his views from those of the majority).

186. Bush v. Vera, 517 U.S. 952 (1996).

187. *See id.* at 999 (Thomas, J., concurring in the judgment) ("In my view, application of strict scrutiny in this suit was never a close question. I cannot agree with JUSTICE O'CONNOR's assertion that strict scrutiny is not invoked by the intentional creation of majority-minority districts."). Additionally, whereas the Justices in the plurality insisted that race be the predominant factor, Justice Thomas found legislative action offensive when race was merely one motivation. *Id.* at 959 (plurality opinion) ("For strict scrutiny to apply, the plaintiffs must prove that other, legitimate districting principles were 'subordinated' to race. By that, we mean that race must be '*the predominant* factor motivating the legislature's [redistricting] decision.' We thus differ from JUSTICE THOMAS, who would apparently hold that it suffices that racial considerations be *a* motivation for the drawing of a majority-minority district." (citations omitted)).

188. *E.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 247 n.5 (1995) (Stevens, J., dissenting).

> action programs . . . . It is another thing altogether to equate the many well-meaning and intelligent lawmakers . . . who have supported affirmative action over the years, to segregationists and bigots.[189]

Although Thomas's opinions seem designed to renounce orthodox civil rights jurisprudence, race remains central to his judicial identity.[190] Despite the criticism Thomas has received from African Americans, he continues to view himself as a noble civil rights soldier, doing "what he has to do" to challenge the conventional wisdom, just as Marshall and other leaders of the civil rights movement did what they had to in the mid-twentieth century.[191] Indeed, Thomas believes that he has been unfairly vilified by African Americans because he is unwilling to surrender the fight for true racial equality.[192]

And Thomas believes that, just like the civil rights leaders before him, he must suffer for his ideas before they can be vindicated.[193] In front of a conservative audience at the Walter D. George School of Law, Thomas spoke of a "new brand of stereotypes and ad hominem assaults," designed to target independent-minded African Americans,

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189. *Id.* (emphasis added) (citation omitted).

190. MERIDA & FLETCHER, *supra* note 2, at 10 ("Even as Thomas goes about his work, perhaps the purest conservative on the court, it's his racial identity that most defines him. . . . [T]he racial prism . . . is the prism through which Thomas often views himself.").

191. *See id*. at 23 ("The courageous underdog is one of his favorite personas, adopted by him in countless speeches and observed by friends in private conversation. Putting on his battle armor—seeing himself as a man under attack for his ideas—is one of the ways that Thomas copes with the ostracism he endures from blacks who disagree with him. . . . [Thomas] has turned himself into the most successful victim in America."); *see also id.* at 231 ("Having an enemy to fight is what links Thomas and the conservative faithful.").

192. *See id.* at 226 ("[M]y only choice was to stand up for my views or abandon them . . . to turn and run from myself, to abandon my views without being convinced that they were the wrong views." (quoting Clarence Thomas)); *see also* GERBER, *supra* note 8, at 33 ("Does a black man instantaneously become 'insensitive,' a 'dupe' or an 'Uncle Tom,' because he happens to disagree with the policy of affirmative action?" (quoting Clarence Thomas, Speech Delivered at Walter F. George School of Law, Mercer University, May 1, 1993)).

193. *See* Toobin, *supra* note 177, at 40 ("Thomas said that when he arrived in Washington, people with beliefs such as his, especially blacks, were dismissed as 'sellouts' or 'insensitive' and that as a Reagan Administration official he had been called 'an ultra-conservative.' He added—as if such addition were necessary—'Later, I would be called worse things.' It was time now 'for regrouping and rejuvenation,' he said. 'As I look out in the audience today, I see hope.'"); *see also supra* note 11; *cf.* MERIDA & FLETCHER, *supra* note 2, at 337 ("[Thomas] discussed the confirmation battle in terms usually reserved for religious allegory . . . . 'I watched in horror as people who claimed to be on the side of some greater good tore at my very soul,' Thomas said. 'But . . . I found strength by running toward God . . . . [T]he burdens of unfairness and frustration became an opportunity to be virtue[ous].'").

like himself, who "dare to question current social and cultural gimmicks," or "dare to disagree with the latest ideological fad."[194] In this new world of bigotry, segregation on the basis of "color" has given way to segregation of the basis of "[n]onconforming [i]deas."[195] As a result, Thomas claimed, he has been forced to "pay for [his] ideological trespasses" through "systematic character assassination[s]," which he called "the modern-day version of the old public floggings."[196]

In truth, Thomas's rhetoric is somewhat exaggerated. The civil rights protestors of the mid-twentieth century were forced to endure tear gas, fire hoses, and billy clubs, whereas Thomas's "modern-day flogging" mostly consists of fairly ordinary public scrutiny.[197] Thomas, who is notoriously sensitive to criticism,[198] is nothing if not dramatic.[199] He frequently compares his critics to slave-owners and Ku Klux Klan members,[200] drawing "absurd" analogies "between the difficult but routine challenges that public figures must weather and the most oppressive and vile chapter in American history."[201] Although the specifics of his analogies vary, Thomas always casts himself as the courageous victim who dares to think independently, and he always casts his critics as the narrow-minded bigots who are out to demean him:

> For daring to reject the ideological orthodoxy that was prescribed for blacks by liberal whites, I was branded a traitor to my race—as if anyone . . . had the right to tell me what beliefs a black man was permitted to hold. If I dared to step out of line, if I refused to be

194. Toobin, *supra* note 177, at 39 (quoting Clarence Thomas).

195. *Id.* at 40 ("Instead of seeing signs on public doors saying 'No Coloreds Allowed,' the signs were 'No Nonconforming Ideas Allowed.'" (quoting Clarence Thomas)).

196. *Id.* (quoting Clarence Thomas).

197. *See id.* at 40–41 ("Thomas has, to be sure, endured tough public criticism from liberal opponents. But to go along with the suggestion that Thomas and the civil-rights protestors faced similar obstacles—and displayed comparable courage—may well be to take an unduly sympathetic view of the difficulties the Justice has faced.").

198. *See* MERIDA & FLETCHER, *supra* note 2, at 230 ("Famously thin-skinned . . . Thomas has amazing recall for slights and critiques he feels are unfair to him. To deliver a tough assessment that reaches him is to risk forever being locked, unfavorably, in his memory."); *see also id.* at 186 ("[Thomas] is fiercely loyal to those who have helped him and holds long grudges against those who haven't.").

199. *Id.* at 368 ("Sometimes, Thomas hunts ants with grenades.").

200. *Id.* at 367; *see also* THOMAS, *supra* note 2, at 241–60 (describing his confirmation process in a chapter egregiously entitled "Invitation to a Lynching").

201. MERIDA & FLETCHER, *supra* note 2, at 367–68.

> another invisible man, then I wasn't *really* black, I was an Uncle Tom doing Massa's bidding.[202]

More than anything, however, Thomas views himself as misunderstood.[203] He believes that he has "embrace[d] the values that have worked" for African Americans, and "reject[ed] those that have failed."[204] In his own mind, he is fighting for a "positive" civil rights agenda, rather than merely fighting against affirmative action.[205] In a speech to a national audience of African-American lawyers in 1998, Thomas made a heartfelt attempt to correct this misunderstanding:

> It pains me deeply—more deeply than any of you can imagine—to be perceived by so many members of my race as doing them harm. . . . All the sacrifice, all the long hours of preparation were to help, not to hurt. . . . I have come here today not in anger or to anger. . . . Nor have I come to defend my views, but rather to assert my right to think for myself, to refuse to have my ideas assigned to me as though I was an intellectual slave because I am black.[206]

Despite Thomas's desire to be embraced by African Americans as a civil rights hero of his time, he seems to have lost faith in his own generation. He no longer hopes to convert his political opponents,

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202. THOMAS, *supra* note 2, at 184.

203. MERIDA & FLETCHER, *supra* note 2, at 5, 176. Aubrey Immelman, "an expert at developing personality profiles of public figures," has studied Thomas thoroughly and concluded that "Thomas [is] a discontented man who 'views himself as misunderstood.' He wants to reach out to those who don't understand him . . . but fears getting hurt, and fears failure and humiliation. So he . . . has a tendency to be judgmental and inflexible. He's a very critical individual, not that accepting of others' flaws and shortcomings." *Id.* at 5 (quoting Aubrey Immelman).

204. Toobin, *supra* note 177, at 39.

205. *See* Masugi, *supra* note 91, at 232 ("[Thomas] wanted a positive, principled civil rights policy that was also consistent with a political and social agenda that respected individual liberty."); *see also* MERIDA & FLETCHER, *supra* note 2, at 302 ("It's not that I'm against the advancement of the race . . . it's that our strategy for advancement has got to change." (quoting Clarence Thomas)); *cf.* THOMAS, *supra* note 2, at 178 ("My main quarrel with the Reagan administration was that I thought it needed a *positive* civil-rights agenda, instead of merely railing against quotas and affirmative action. This was my top priority at EEOC: to do what I could to make things better for ordinary people.").

206. Justice Clarence Thomas, Address to the National Bar Association, Memphis, Tennessee (July 29, 1998), *available at* http://www.pbs.org/newshour/bb/law/july-dec98/thomas_7-29.html; *see also* MERIDA & FLETCHER, *supra* note 2, at 23 ("Nowhere in public will you see [Thomas] more alive, more rebellious, less cautious, more at ease than in a roomful of black conservatives. Here, he can scan the crowd and see people like himself. Here, he can promote his views to an amen chorus, still be black and not scorned.").

only to outlive them.[207] Instead, Thomas has placed his faith in the fresh minds of African-American children, for whom he always makes time:

> [Thomas] spotted a group of black fourth and fifth graders from a private academy and, hoping to inspire them, sidled over. This was vintage Thomas, always drawn to the children in a room. . . .
>
> . . . In children, Thomas sees uncluttered minds, fresh possibilities, hope—the hope that maybe they won't prejudge him, won't view him through the lens of their elders, some of whom he believes are stuck on old ideas. Maybe they will grow up to become independent thinkers, which is how Thomas sees himself. So he's never too busy for the kids. . . .[208]

This anecdote demonstrates Thomas's hope that the next generation of African Americans will embrace his equal protection jurisprudence, ushering in a new era of African-American thought. Only then can Thomas solidify his legacy as the great civil rights leader he believes himself to be.

B. Writing for the Future

For Thomas, Harlan and his renowned civil rights dissents demonstrate how unpopular opinions can prevail with time.[209] Although Harlan was sometimes called the "Great Dissenter" in the early twentieth century, the label primarily referred to his tax and antitrust dissents.[210] Harlan's contemporaries largely dismissed his civil rights dissents as moralizing and eccentric.[211] Not until *Brown* "sent scholars scrambling to study him" was Harlan, "the lone champion of black civil rights on the turn-of-the century Court," finally "hailed as a prophet."[212]

Thus, it was not Harlan's civil rights dissents themselves that earned Harlan his legacy of greatness, but rather society's

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207. *See* MERIDA & FLETCHER, *supra* note 2, at 22 ("In public and in private, [Thomas] loved telling people that he planned to work out vigorously so that he could live a long life, stay on the court for forty or fifty years, and outlast all his critics.").

208. *Id.* at 2–3.

209. MERIDA & FLETCHER, *supra* note 2, at 250.

210. PRZYBYSZEWSKI, *supra* note 16, at 8.

211. *Id.*

212. *Id.*

determination that his dissents were correct. History vindicated Harlan only because his opinions accurately foreshadowed a change in the law.[213] Despite the fact that Harlan's dissents were not even mentioned in the 1953 edition of the *Encyclopedia of American History*, for example, "Harlan made it onto a list of great judges in 1958 primarily on the weight of those dissents."[214] Now, when Harlan is called the Court's "first great dissenter," the label celebrates his civil rights dissents.[215]

Part of the reason that Thomas relates to Harlan, this Note contends, is because Thomas's contemporaries often dismiss him just as Harlan's contemporaries dismissed Harlan at the turn of the twentieth century.[216] Scholars often question Thomas's significance as a Justice, dismissing Thomas as peculiar[217] and irrelevant.[218] To some extent, Thomas's radical ideology and stubborn temperament have reduced his contemporary significance on the Court. As "the most conservative" Justice on the Court,[219] Thomas is more willing than some of his ideological allies to "extend[] his line of thinking to its logical conclusion, regardless of the disruptive effects a ruling would have on American society."[220] Furthermore, Thomas is rarely willing to compromise even on small points.[221] As a result, Thomas is "not much of a player in his workplace."[222] He is "ideologically isolated"

213. *Id.*

214. *Id.*

215. *See, e.g.*, *The Supreme Court: A New Kind of Justice* (PBS television broadcast Jan. 31, 2007), *available at* http://www.pbs.org/wnet/supremecourt/about/index.html ("The [*Civil Rights Cases*], besides re-writing the nation's long-running racial drama, would produce the Supreme Court's first great dissent . . . and its *first great dissenter*." (emphasis added)).

216. MERIDA & FLETCHER, *supra* note 2, at 250.

217. When Thomas is dismissed as peculiar, it is likely because of his strange nonparticipation during oral arguments. *See* TOOBIN, *supra* note 3, at 103 (calling Thomas "embarrassingly silent" on the Court). The characteristic has led some to question his intelligence and his dedication. *See* MERIDA & FLETCHER, *supra* note 2, at 309–10 ("[Thomas's] silence has taken a toll on Thomas's reputation. It has even led clerks for other Justices to wonder whether Thomas is just not as bright as some of his colleagues. Or, perhaps, just intellectually lazy.").

218. TOOBIN, *supra* note 3, at 99–101.

219. *Id.*

220. MERIDA & FLETCHER, *supra* note 2, at 333.

221. TOOBIN, *supra* note 3, at 103.

222. MERIDA & FLETCHER, *supra* note 2, at 9.

and "strategically marginal,"[223] having written a body of majority opinions that is "notably thin on constitutionally significant cases."[224]

Following Harlan's path, Thomas seeks to influence the law through passionate separate opinions, rather than through coalitions with his fellow Justices.[225] In the Court's more momentous cases, "Thomas's voice is most often heard in strongly worded dissents and concurrences that he *believes* one day will become law."[226] Writing separately, Thomas is able to distinguish his beliefs from those of his colleagues and eternalize his role as an individual Justice. Moreover, through his separate opinions, Thomas is able to preserve his ideas until the country is ready to vindicate them.

Thomas's lonely separate opinions may make him appear marginalized and inconsequential to scholars. And perhaps Thomas is, for scholars of his generation. But Thomas may not write his separate opinions for his contemporaries—perhaps he writes them for the future. As a proponent of natural law, Thomas likely believes that the United States is on a divine mission, and that his views are an inevitable part of that mission.[227] But as confident as Thomas may be that his *views* will be vindicated, without his separate opinions there would be little for the next generation to celebrate if and when that day comes. Like Harlan, Thomas has sacrificed his significance and relevancy on the Court so that he, through his words, can become significant in legacy.

CONCLUSION

Thomas views himself as an honorable civil rights soldier who has sacrificed his contemporary reputation to fulfill an ideal that the founders promised, that Abraham Lincoln proclaimed, and of which Martin Luther King, Jr., dreamed. In this crusade, Thomas has used Harlan's words and principles to manipulate the meaning of *Brown* in favor of his own equal protection philosophy. He has read Harlan's colorblind Constitution to endorse an ideology identical to his own. In

223. TOOBIN, *supra* note 3, at 103; *see also* MERIDA & FLETCHER, *supra* note 2, at 282 ("[H]is years on the court have been marked by strongly worded dissents and concurrences that prod and provoke but leave him on the margins of influence . . . .").

224. MERIDA & FLETCHER, *supra* note 2, at 9.

225. *Id.* ("[Thomas] seems happiest when playing the lone wolf, drafting provocative dissents that he hopes—believes—might one day become law.").

226. *Id.* at 253 (emphasis added).

227. *See* discussion *supra* Part II.

Harlan's words, Thomas sees the very reasons he is conservative and the very foundation of his own judicial philosophy. In Harlan's principles, Thomas sees the cause for which he claims to have suffered and the hope by which he perseveres. In Harlan's story, Thomas sees the possibility of redemption.

But only when his lonely opinions foreshadow a change in the law, as Harlan's did, can Thomas assume his position in the history books as one of the Court's "great dissenters" and as one of the United States' prophetic leaders of civil rights. Therefore, when Thomas encounters a classification on the basis of race, he writes with a passion intended not only for the contemporary reader but also for the history books. He writes categorically and consistently, and he articulates his colorblind perspective with fervor unrivaled by his fellow Justices. When Thomas writes a civil rights opinion that could be considered radical or extreme, he does so for a different generation. But as Thomas himself has shown, aspiring prophets come with their own agendas, and words are easy to manipulate.